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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 LEWELLYN CHARLES COX IV,
12 Plaintiff,
13 v.
14 UNITED STATES OF AMERICA,
15 Defendant.
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Case No. 8:19-cv-00061-CJC-KES

ORDER TO SHOW CAUSE WHY IN
FORMA PAUPERIS APPLICATION
SHOULD NOT BE DENIED FOR
FAILURE TO STATE A CLAIM

17
18 **I.**

19 **INTRODUCTION**

20 On January 7, 2019, pro se Plaintiff Lewellyn Charles Cox, IV (“Plaintiff”)
21 constructively filed his initial Complaint pursuant to the Freedom of Information
22 Act (“FOIA”), 5 U.S.C. § 552. (Dkt. 1 [signature date].) On March 1, 2019,
23 Plaintiff constructively filed his First Amended Complaint (“FAC”). (Dkt. 8.)
24 Plaintiff is requesting to proceed in forma pauperis (“IFP”). (Dkts. 5, 7, 10, 12.)

25 Under 28 U.S.C. § 1915(e)(2)(B), a federal court should dismiss an IFP
26 complaint that is (1) frivolous or malicious, (2) fails to state a claim on which relief
27 may be granted, or (3) seeks monetary relief from a defendant who is immune from
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1 such relief. See Marks v. Solcum, 98 F.3d 494, 495 (9th Cir. 1996). A complaint
2 may fail to state a claim for two reasons: (1) lack of cognizable legal theory; or (2)
3 insufficient facts under a cognizable legal theory. Balistreri v. Pacifica Police
4 Dep't, 901 F.2d 696, 699 (9th Cir. 1990) (as amended). In determining whether a
5 complaint states a claim on which relief may be granted, its allegations of material
6 fact must be taken as true and construed in the light most favorable to plaintiff.
7 Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989).

8 II.

9 SUMMARY OF ALLEGATIONS

10 In his FAC, Plaintiff names the United States of America as Defendant and
11 alleges failure to comply with FOIA. (Dkt. 8 at 3.) For relief, Plaintiff requests
12 \$450,000 in damages. (Id. at 6.)

13 Plaintiff alleges that he mailed his initial FOIA request in December 2017,¹
14 directed to the Secret Service. (Id. at 5.) On June 18, 2018,² the Department of
15 Homeland Security (“DHS”) responded as follows: “Secret Service searched its
16 main indices, and any responsive records identified in connection with that search
17 have been located and forwarded to this office for review and a disclosure
18 determination. ...[D]ue to the increasing number of FOIA[] requests received by
19 this office, we may encounter some delay in processing your request.” (Id. at 7.)

20 On August 23, 2018, DHS sent Plaintiff a letter, indicating that Plaintiff
21 requested the following information: (1) a copy of the E-mail sent to Special Agent
22 James Mikkelson, from State of California Parole Office in October 2008, with a
23 photo of Plaintiff, (2) the origin and date of the photo, and (3) a certification as to
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25 ¹ The June 18, 2018 letter from DHS indicates that the request was submitted
26 to the Secret Service on April 16, 2018. (Dkt. 8 at 7.)

27 ² This letter indicates that an initial response was sent to Plaintiff on May 9,
28 2018. (Dkt. 8 at 7.) Plaintiff does not include the May 9, 2019 letter with his FAC.

1 when the photo was first saved to the Secret Service database and added to a photo
2 lineup used in Plaintiff's criminal case. (Id. at 8.) For the first request, DHS
3 indicated that all documents responsive to Plaintiff's request had been forwarded to
4 DHS for processing; after processing, DHS will release disclosable documents to
5 Plaintiff. (Id.) DHS reminded Plaintiff of the possibility of delay. (Id.) For the
6 latter two requests, DHS advised Plaintiff that his requests do not comply with
7 FOIA because FOIA "does not require an agency to either create new records,
8 answer questions posed by requesters, or attempt to interpret a request that does not
9 identify specific records." (Id. at 8-9.) For these latter two requests, DHS advised
10 that failure to submit "perfected" requests in thirty days would result in closure of
11 the files. (Id. at 9.)

12 Plaintiff includes a letter he sent DHS on February 24, 2019, stating "after an
13 entire year of waiting for compliance, it appears individuals within your office are
14 intentionally obstructing my request." (Id. at 10.)

15 III.

16 ANALYSIS

17 A. Exhaustion.

18 "Exhaustion of a parties' administrative remedies is required under the FOIA
19 before that party can seek judicial review. ... The complainant must request specific
20 information in accordance with published administrative procedures, see 5 U.S.C.
21 § 552(a)(1), (2) & (3), and have the request improperly refused before that party
22 can bring a court action under the FOIA. See 5 U.S.C. § 552(a)(4)(B)." In re
23 Steele, 799 F.2d 461, 465-66 (9th Cir. 1986); see also Hymen v. Merit Sys. Prot.
24 Bd., 799 F.2d 1421, 1423 (9th Cir. 1986) (FOIA claims dismissed for failure to
25 comply with regulations providing for appeals), overruled on other grounds by
26 Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990). For FOIA requests
27 processed by DHS, the Code of Federal Regulations sets forth administrative
28 exhaustion requirements. See 6 C.F.R. § 5.8 (describing administrative appeals

1 process required before seeking judicial review).

2 A requester need not exhaust administrative remedies, however, when he or
3 she has not received a timely notice of the agency's decision. The agency is
4 required to determine within 10 working days after receiving a request—unless it
5 grants itself an extension for an additional 10 days—whether to comply with the
6 request. See 5 U.S.C. § 552(a)(6)(A) & (B). While the agency need not actually
7 fulfill the request within that period, it is required to notify the requester of whether
8 and how it will comply. See 5 U.S.C. § 552(a)(6)(A)(i). The agency's failure to
9 respond to the initial request within the initial 10-day period (plus any 10-day
10 extension) may constitute "constructive exhaustion." See 5 U.S.C. § 552(a)(6)(C);
11 Oglesby v. U.S. Dept. of Army, 920 F.2d 57, 62 (D.C. Cir. 1990).

12 In the FAC, Plaintiff does not allege that he exhausted his administrative
13 remedies, and he does not include any documents showing efforts to do so. It also
14 does not appear evident that Plaintiff received an untimely response from DHS,
15 constituting constructive exhaustion. Per the letter from DHS, Plaintiff's request
16 was received on April 16, 2018, and DHS initially responded May 9, 2018 (i.e., 17
17 working days later). (Dkt. 8 at 7.) Because Plaintiff has not included the May 9,
18 2018 initial response, it is unclear whether DHS timely responded (which it would
19 have if it granted itself a 10-day extension). Without a showing of administrative
20 exhaustion or untimely response, Plaintiff cannot presently seek judicial review.

21 **B. Requested Relief.**

22 FOIA does not authorize claims for monetary relief. Under FOIA, "the
23 district court of the United States in the district in which the complainant resides ...
24 has jurisdiction to enjoin the agency from withholding agency records and to order
25 the production of any agency records improperly withheld from the complainant."
26 5 U.S.C. § 552(a)(4)(B). Although the FOIA statute explicitly creates a federal
27 private right of action to sue for injunctive relief against a federal agency, the
28 statute does not provide for a right to pursue monetary damages. See 5 U.S.C.

1 § 552; O'Toole v. I.R.S., 52 F. App'x 961, 962 (9th Cir. 2002) (“[Plaintiff] failed to
2 state a valid FOIA claim because he requested only monetary damages in this
3 action, and the statute does not authorize such relief.”); Gasparutti v. United States,
4 22 F. Supp. 2d 1114, 1116-17 (C.D. Cal. 1998) (“There is no provision under FOIA
5 which provides for an award of money damages for alleged wrongs by federal
6 agencies.”); Dunne v. United States, 2019 WL 1048239, at *4 (N.D. Cal. Mar. 5,
7 2019) (“[Plaintiff] has in fact failed to state a FOIA claim because the only remedy
8 he seeks is monetary relief.”).

9 In his Complaint, Plaintiff includes the following request for relief: “I request
10 \$450,000 for withholding FOIA.” (Dkt. 8 at 6.) Because Plaintiff only seeks
11 monetary relief, he fails to state a claim under FOIA.

12 IV.

13 CONCLUSION

14 **On or before May 1, 2019**, Plaintiff may discharge this Order to Show
15 Cause by showing that he does state a cognizable claim. In particular, Plaintiff
16 should address: (1) whether he exhausted his administrative remedies or DHS failed
17 to timely respond; (2) whether he only seeks monetary damages or other relief; and
18 (3) whether he received any responsive documents or further correspondence from
19 DHS regarding the E-mail sent to Special Agent James Mikkelson, from State of
20 California Parole Office in October 2008 (i.e., the one request DHS was reviewing).
21 The Court defers ruling on Plaintiff's IFP application until he does so.

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23 DATED: April 2, 2019


24 CORMAC J. CARNEY
25 United States District Judge

26 Presented by:


27 KAREN E. SCOTT
28 United States Magistrate Judge